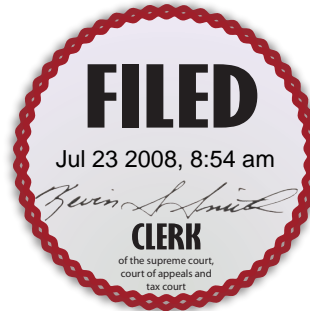


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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GREGORY FLEMING,  
  
Appellant-Petitioner,

vs.

STATE OF INDIANA,  
  
Appellee-Respondent.

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No. 46A04-0711-PC-652

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APPEAL FROM THE LAPORTE SUPERIOR COURT  
The Honorable Kathleen B. Lang, Judge  
Cause No. 46D01-0108-CF-92

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**July 23, 2008**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**DARDEN, Judge**

## STATEMENT OF THE CASE

Gregory M. Fleming appeals the denial of his petition for post-conviction relief.

We affirm.

## ISSUES

1. Whether the trial court erred when it accepted Fleming's guilty plea.
2. Whether the State established a sufficient factual basis.

## FACTS

On August 14, 2001, Fleming sold an OxyContin tablet to a confidential police informant. The transaction occurred at Fleming's home at 120 Grace Street in Michigan City. Fleming received a \$20.00 bill of police pre-recorded drug buy money in payment, and when the police arrested him on August 21, 2001, the same \$20.00 bill was still in his possession. On August 28, 2001, the State charged Fleming with one count of class B felony dealing in a schedule II controlled substance. Subsequently, the parties entered into a written but "open plea"<sup>1</sup> agreement under which Fleming agreed to plead guilty to the amended charge of maintaining a common nuisance as a class D felony. At Fleming's guilty plea hearing on October 17, 2002, the trial court asked how he intended to plead to the amended charge of class D felony maintaining a common nuisance; Fleming responded, "Guilty." (Tr. 7). As the hearing proceeded, the following colloquy ensued between the trial court, Fleming, and his counsel:

THE COURT: [O]n the 14<sup>th</sup> day of August of the year 2001, you were aware that controlled substances were sold at [your] residence?

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<sup>1</sup> An "open plea" is one in which the sentence to be imposed is left to the discretion of the court. *Allen v. State*, 865 N.E.2d 686, 689 (Ind. Ct. App. 2007).

[FLEMING]: Yes, sir.

THE COURT: What type of controlled substances?

\* \* \*

[FLEMING]: OxyContin.

\* \* \*

THE COURT: And you understand that was an illegal substance?

[FLEMING]: Yeah, Your Honor, but one thing I want to get cleared on this whole situation of this here case –

[FLEMING'S COUNSEL]: - Judge, he had the drug himself, legally, with prescription, but the allegations is [sic] that he gave it to someone else for some type of consideration. So he himself possessed the drug legally, but he sold it to someone and that's where the crime took place.

[THE COURT]: Is that right, Mr. Fleming?

[FLEMING]: Yes, sir.

[THE COURT]: Okay. You had the drug legally.

\* \* \*

[THE COURT]: And you knew you couldn't sell it somebody else.

[FLEMING]: I didn't know that, Your Honor, really, I didn't know that.

[THE COURT]: You didn't?

[FLEMING]: No. The way [the confidential informant] tricked me, I didn't know that.

[THE COURT]: She tricked you?

[FLEMING]: Yeah. I'm guilty, Your Honor.

[THE COURT]: Well it doesn't sound like you're guilty.

[FLEMING]: But, you know, I just go on and get it over with. Guilty.

[FLEMING'S COUNSEL]: Judge, if I might, again, with Mr. Fleming not being well-versed of the law, again he is not aware of all the legal implications. As we all know, ignorance of the law is no excuse. He now knows obviously it was an illegal act and is admitting that in court today, it was a crime.

[FLEMING]: Yes, sir.

[THE COURT]: It's not good enough, [Counsel]. Mr. Fleming, let's start again. Okay? You said you had a prescription for OxyContin?

[FLEMING]: Yes, sir, Your Honor.

[THE COURT]: Okay and you realize that you can't sell it without a prescription.

[FLEMING]: Yes, sir.

[THE COURT]: Okay. You knew that?

[FLEMING]: I know it now.

[THE COURT]: No. No. No. You knew that at the time? Did you know that you can't use your prescription to buy drugs and then sell those drugs to other people? Did you know that?

[FLEMING]: I'm guilty, Your Honor, you know –

[THE COURT]: - no. Wait a minute. Just answer my question. Did you know that?

[FLEMING]: No. I didn't really know that.

[THE COURT]: Okay. I'm not going to accept your plea agreement, Mr. Fleming. I think we'll set this matter for trial today.

[FLEMING'S COUNSEL]: Judge, if I could just have one moment. Again, I think [Mr. Fleming]'s getting a little bit confused by the question. \* \* \* [Mr. Fleming], do you understand that the only way you can get OxyContin, is to get a prescription from a doctor; right?

[FLEMING]: Yeah.

[FLEMING'S COUNSEL]: You're not a doctor, are you?

FLEMING: No.

[FLEMING'S COUNSEL]: So you're not allowed to give your drugs to anyone else.

FLEMING: No.

[FLEMING'S COUNSEL]: So . . . because you did that, that's a crime.

FLEMING: Yes, sir.

[FLEMING'S COUNSEL]: And you knew that at the time.

FLEMING: Yes, sir. Yes, sir.

\* \* \*

THE COURT: Okay. And Mr. Fleming, this happened on August 14, 2001?

(Exhibit Volume 7-11). The trial court then stated for the record that Fleming had understood the nature of the charge against him and the possible sentences associated therewith. The trial court also found that there existed a sufficient factual basis for Fleming's guilty plea and took the matter under advisement, pending the completion of a pre-sentence investigation report.

On November 14, 2002, the trial court conducted Fleming's sentencing hearing, wherein it imposed an eighteen-month sentence to be served in the Department of Correction. Fleming did not pursue a direct appeal. On July 6, 2007, he filed a petition for post-conviction relief, wherein he alleged that the record did not contain a sufficient factual basis to support his conviction. The post-conviction court conducted an evidentiary hearing on Fleming's petition on September 18, 2007. On October 23, 2007,

it issued an order, wherein it found that Fleming had failed to establish grounds for relief and denied Fleming's petition. Fleming now appeals.

### DECISION

Post-conviction procedures do not afford a petitioner a "super appeal." *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). Rather, subsequent collateral challenges for relief must be based on grounds enumerated in Post-Conviction Rule 1. *Williams v. State*, 808 N.E.2d 652, 659 (Ind. 2004).

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Upon reviewing a petition for post-conviction relief, we may consider only the evidence and reasonable inferences supporting the judgment of the post-conviction court.

*Culvahouse v. State*, 819 N.E.2d 857, 860 (Ind. Ct. App. 2004) (internal citations omitted).

#### 1. Acceptance of Guilty Plea

##### A. Maintaining Innocence

Fleming first argues that the trial court improperly accepted his guilty plea, because he "maintained his innocence throughout the Guilty Plea Hearing." Fleming's Br. at 4. He correctly asserts that a judge may not accept a guilty plea when the defendant both pleads guilty and maintains his innocence at the same time, and that acceptance of such a plea constitutes reversible error; however, such was not the case here. *Bland v. State*, 708 N.E.2d 880, 881-882 (Ind. Ct. App. 1999).

At the guilty plea hearing, Fleming initially testified that when he sold the OxyContin tablet to the police informant, he did not know that it was a criminal offense to sell one's own prescription medication to another. When the trial court then responded, "Well it doesn't sound like you're guilty," Fleming insisted that he was guilty on two occasions – first telling the trial court, "[J]ust go on and get it over with . . . . Guilty," and later saying, "I'm guilty, Your Honor." (Exhibit Volume 9, 10). The trial court then stated that it was going to reject Fleming's plea agreement and that the parties should prepare for trial. At that moment, Fleming's counsel intervened and requested the trial court's indulgence and questioned Fleming as follows:

[FLEMING'S COUNSEL]: [Mr. Fleming], do you understand that the only way you can get OxyContin, is to get a prescription from a doctor; right?

[FLEMING]: Yeah.

[FLEMING'S COUNSEL]: You're not a doctor, are you?

FLEMING: No.

[FLEMING'S COUNSEL]: So you're not allowed to give your drugs to anyone else.

[FLEMING]: No.

[FLEMING'S COUNSEL]: So . . . because you did that, that's a crime.

[FLEMING]: Yes, sir.

[FLEMING'S COUNSEL]: And you knew that at the time.

[FLEMING]: Yes, sir. Yes, sir.

(Exhibit Volume 10-11).

The record reveals that despite Fleming's initial comment regarding his ignorance of the law, subsequent thereto, he acknowledged his guilt and then, under further questioning from his counsel, unequivocally admitted that he knowingly sold an OxyContin tablet to another person in violation of the statute criminalizing such conduct. Thus, the post-conviction court did not err by denying relief.

*B. Adequacy of Factual Basis*

Next, Fleming contends that the trial court failed to establish an adequate factual basis to support his guilty plea. Indiana Code section 35-35-1-3(b) states that "the court shall not enter judgment upon a plea of guilty unless it is satisfied from its examination of the defendant or the evidence presented that there is a factual basis for the plea."

The requirement of a factual basis ensures that when a plea is accepted there is sufficient evidence from which a court can conclude that the defendant could have been convicted had he stood trial. The finding that an adequate factual basis exists is a subjective determination committed to the trial court's wide discretion. Such latitude is essential because of the varying degrees and kinds of inquiries required under the varied circumstances that confront trial courts. 'A factual basis exists when there is evidence about the elements of the crime from which a court could reasonably conclude that the defendant is guilty.' The determination that an adequate factual basis exists arrives before us clothed with a presumption of correctness. We review claims of error in that respect for an abuse of discretion.

*Oliver v. State*, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006) (quoting *Butler v. State*, 658 N.E.2d 72, 76-77 (Ind. 1995)), (internal citations omitted).

"A post-conviction petitioner must, in addition to proving the lack of a factual basis, also prove that he was prejudiced by the lack of a factual basis." *Wilson v. State*,

707 N.E.2d 318, 321 (Ind. Ct. App. 1999). “Evidence proving that the petitioner did not commit the crime would meet this burden.” *Id.*

An adequate factual basis for the acceptance of a guilty plea may be established as follows: (1) by the State’s presentation of evidence on the elements of the charged offense; (2) by the defendant’s sworn testimony regarding the underlying events; (3) by the defendant’s admission of the truth of the allegations in the information read in court; or (4) by the defendant’s acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. *Oliver*, 843 N.E.2d at 581.

Fleming argues that in order to prove that he maintained a common nuisance, the State was required to establish that he engaged in a continuous or recurring violation on more than one occasion. He argues that because the State did not establish that he had engaged in more than a single sale of controlled substances, there was an insufficient basis for his guilty plea.

Although Fleming insists that “[m]aintaining a Common Nuisance requires proof of more than one transaction,” such is not the case. Fleming’s Br. at 6. Indiana Code section 35-48-4-13 provides, in relevant part, the following:

- (b) A person who knowingly or intentionally maintains a building, structure, vehicle, or other place that is used one (1) or more times:
  - (1) by persons to unlawfully use controlled substances; or
  - (2) for unlawfully:
    - (A) manufacturing;
    - (B) keeping;
    - (C) offering for sale;
    - (D) selling;
    - (E) delivering; or
    - (F) financing the delivery of;

controlled substances, or items of drug paraphernalia as described in IC 35-48-4-8.5;  
commits maintaining a common nuisance, a Class D felony.

Pursuant to the statute, a person commits class D felony maintaining a common nuisance if he knowingly or intentionally maintains a building or structure that is used **“one (1) or more times”** for the unlawful offering for sale, selling, or delivering controlled substances.<sup>2</sup> Thus, Fleming’s claim that he only engaged in a single sale must fail because the statute criminalizes the sale of controlled substances regardless of whether the sale occurs as part of a single transaction or a continuous or recurring pattern of criminal conduct.

At the guilty plea hearing, Fleming admitted that he knowingly sold an OxyContin tablet in violation of the law to another person, and that the transaction occurred in his residence at 120 Grace Street. The post-conviction court did not abuse its discretion in finding that a sufficient factual basis existed for Fleming’s guilty plea where, as here, the State presented evidence about the elements of the crime from which the trial court could have reasonably concluded that Fleming was guilty of the crime to which he pled guilty.

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<sup>2</sup> The State correctly notes that the statute was amended in 1998 to include the “one (1) or more times” language. P.L. 31-1998 § 11. Fleming was charged and convicted some three or four years later in 2002.

Affirmed.<sup>3</sup>

NAJAM, J., and BROWN, J., concur.

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<sup>3</sup> Fleming contends that the evidence was insufficient to support his conviction and argues that “a continuous or recurring violation must exist in order to be convicted of this offense.” Fleming’s Br. at 7. For reasons already stated herein, we find no error from the post-conviction court’s denial of relief on this claim.

He also argues that his conviction must be vacated because the State failed to properly file a charging information alleging the crime of maintaining a common nuisance. Fleming’s Br. at 4. We find that this argument is waived. *See Walker v. State*, 843 N.E.2d 50, 57 (Ind. Ct. App. 2006) (holding that issues not raised in the petition for post-conviction relief may not be raised for the first time on post-conviction appeal), *reh’g denied, trans. denied*.